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Nos. 09-1298 & 09-1302

In The Supreme Court of the United States

♦

GENERAL DYNAMICS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

♦

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

♦

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

♦

REPLY BRIEF OF PETITIONER THE BOEING COMPANY

♦

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Rule 29.6 disclosures appear in its opening brief (at ii). There are no changes to those disclosures.

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ARGUMENT

The defining characteristic of both alternative rules the Government asks the Court to adopt is that the Government will *never* be barred from litigating a claim or defense as a result of its own decision to invoke the state secrets privilege, and its opponent will *always* suffer the adverse litigation consequences of protecting the Nation's secrets. The Government's primary submission – that "moving party" status, as this Court used the term in *United States v. Reynolds*, 345 U.S. 1, 12 (1953), simply turns on which party filed suit in the Court of Federal Claims ("CFC") – ignores the fact that the governing statute *requires* the contractor to initiate proceedings in the CFC (or before a board of contracting appeals ("BCA")) in *all* Government contract disputes, regardless of which side is asserting the claim and seeking affirmative relief. Under this statutory scheme, a contractor's only avenue for presenting a defense to a Government claim is to put the Government to its burden of proving that claim in proceedings initiated by the contractor before the CFC or a BCA. Thus, the rule the Government advances necessarily means that, regardless of who is bringing the claim for affirmative relief and who is defending, the contractor's claim or defense will *always* be barred by the state secrets privilege and the Government's claim or defense *never* will.

The same is true of the alternative rule proposed by the Government. Specifically, the Solicitor General urges the Court to hold that in cases, like this one,

where the Government is the moving party advancing a civil claim and the opposing party's ability to defend is substantially prejudiced by invocation of the state secrets privilege, the Government's claim should be permitted to proceed. Yet the Government does not deny that when the shoe is on the other foot, it invariably argues that a private party's civil claim *against* it must be dismissed whenever *the Government's* defense is substantially prejudiced by the need to protect state secrets.

In contrast to the "Government always wins" submissions of the Solicitor General, the rule urged by the Contractors applies evenhandedly to both sides, does not penalize the Government for the Executive's decision to invoke the state secrets privilege, and vindicates the fundamental due process principle that a claim for affirmative relief may not proceed if the opposing party's ability to defend is substantially prejudiced.

I. The Government Is the Moving Party.

Despite the fact that the Government seeks to sustain the Contracting Officer's decision for the Government on its default-termination claim and to recover $1.35 billion plus interest from the Contractors based on that decision, the Government argues that it is not the moving party on that claim. In support of this argument, the Government repeatedly invokes the Contractors' separate request to recover their unreimbursed costs in the proceedings below

and asserts that the Government, by contrast, sought no "affirmative relief" *from the CFC*. In so arguing, the Government asks this Court to close its eyes to the procedural posture of this case and the statutory framework in which it arises, and to ignore the reality that the Government is the party seeking affirmative relief on the underlying default-termination claim at issue here.

A. The Contractors' Assertion of a Separate Claim for Costs Does Not Make Them the Moving Parties on the Government's Default-Termination Claim.

The Government repeatedly emphasizes the Contractors' request to recover their unreimbursed costs in the proceedings below (even though that claim is not before this Court) in an effort to obscure the fact that it is the Government, and only the Government, that seeks affirmative relief on the default-termination claim (which is before the Court). Under well-settled precedent, however, these are separate claims that belong to (and must be asserted and proved by) different parties, and must be (and were) separately submitted to and decided by the Contracting Officer and the courts. The Contractors do not dispute that they may be the moving party on their claim for costs, or that the same principles they urge this Court to apply to the Government's default-termination claim might also apply to the Contractors' claim for costs. It is abundantly clear, however, that the Government, not the Contractors, is the

moving party on its own default-termination claim. And the issue before this Court is not, as the Government would have it, whether the assertion of the state secrets privilege may properly bar the Contractors from pursuing their claim for costs against the Government, but rather whether the assertion of the privilege may bar the Contractors from presenting their superior-knowledge *defense* to the Government's default-termination claim.

1. In the proceedings below, the Contractors did seek their unreimbursed costs of performance from the Government. Contrary to the Government's intimations, however, they sought this affirmative relief not in connection with the Government's default-termination claim, but rather as a separate claim to be litigated and decided by the court only in the event that the Government's claim was rejected and the default termination was converted into a termination for convenience.

As the CFC correctly recognized, it is well settled that "[t]ermination for default is a government claim, and termination for convenience is a separate contractor claim," and that "a termination for convenience cost recovery claim . . . is distinct from the Government's claim for return of unliquidated progress payments, which accompanies the default termination." *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 285, 289, 291 (1997); *see also Malone v. United States*, 849 F.2d 1441, 1443-44 (Fed. Cir. 1988) (so holding). The Government cannot, and

does not, deny that default termination is a Government claim that must be asserted by the Government, decided by the Contracting Officer, and justified by the Government if the contractor puts the Government to its proof before a BCA or the CFC. *See* Boeing Br. 7-9. A claim for costs, by contrast, is a separate claim that belongs to – and must be asserted and proved by – the contractor. Thus, if a contractor wishes not only to defend against the Government's default-termination claim but also to seek its unreimbursed costs, the contractor must expressly file its own separate claim for those costs with the Contracting Officer and, if that claim is denied, prove its costs before a BCA or the CFC. A contractor is not required, however, to file a claim for costs to defend against a default-termination claim, but if it does not do so, it will not be entitled to any affirmative relief even if it successfully defends against the Government's default-termination claim. *See Malone*, 849 F.2d at 1443-44 ("Because the default termination in this case was a government claim, Malone properly appealed it without first submitting its own claim to the CO."); *Boeing Co. v. United States*, 31 Fed. Cl. 289, 292-93 (1994) ("contractor claims seeking termination for convenience costs and equitable adjustments are not pending before the court merely because a complaint has previously been filed seeking reversal of a termination for default and demand for return of progress payments").

Thus, in this case, the Contractors submitted their request for costs to the Contracting Officer and

then to the CFC as a claim for relief distinct from their defense to the Government's default-termination claim, and that claim was separately decided by both the Contracting Officer and the CFC. *See McDonnell Douglas*, 37 Fed. Cl. at 287-88, 290-91 (detailing the different claims submitted to and decided by the Contracting Officer); Pet. App., No. 09-1298 ("Pet. App.") 382a-429a (1996 CFC decision overturning default termination); Pet. App. 280a-342a (1998 CFC decision on Contractors' claim for costs after separate, subsequent litigation of this claim). Indeed, because the Contracting Officer had not yet rejected the Contractors' claim for costs when they initially filed suit, the CFC's jurisdiction was initially limited to consideration of the Government's default-termination claim. "Not until the cost recovery claim was deemed denied [by the Contracting Officer] and included in plaintiffs' amended complaint . . . did [the CFC] have jurisdiction to review that claim." *McDonnell Douglas*, 37 Fed. Cl. at 291.

2. As the Government appears to recognize, *see* U.S. Br. 28, the party seeking affirmative relief is the moving party within the meaning of *Reynolds*. And there can be no question that the Government, not the Contractors, seeks such relief on the default-termination claim in this case. Indeed, the Government sought and obtained "a final decision by the contracting officer demanding return of unliquidated progress payments" from the Contractors in the amount of $1.35 billion plus interest in connection with its default-termination claim, *McDonnell*

Douglas, 37 Fed. Cl. at 287, and it has repeatedly indicated its intention to enforce this demand if its default-termination claim is upheld by the courts, *e.g.*, JA 339-41. While the Government claims that the affirmative relief it seeks is merely "a happenstance of the timing of payments under the A-12 contract," U.S. Br. 19, there can be no doubt that any party that seeks to alter the status quo by legally compelling another to pay it money is a "moving party" within the meaning of *Reynolds*. And a court should not sanction such affirmative relief when the Government's invocation of the state secrets privilege renders the court unable to determine with confidence that it is warranted. *See* Boeing Br. 47-48.

More generally, as the courts have long recognized and the Government concedes, U.S. Br. 31, default termination is a Government claim, whether before the Contracting Officer, the CFC, or a BCA. *See Malone*, 849 F.2d at 1443-44; *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). The gravamen of such a claim is the Government's contention that a contractor has committed a serious contractual breach, *see Malone*, 849 F.2d at 1443, and when the Government proves such a claim, it is entitled to affirmatively seek monetary relief amounting to a forfeiture from the contractor, as well as a number of other severe penalties, up to and including debarment from public contracting. *See* Boeing Br. 9-11. Finally, whether before a BCA or the CFC, the Government bears the burden of proving

that default termination was justified. *See Lisbon*, 828 F.2d at 763-65. All of these well-established legal principles further confirm that the Government is the moving party on its default-termination claim.

3. The Government labors mightily to recharacterize the Contractors' superior-knowledge defense as an affirmative contractor claim bearing only the most tangential relationship to the Government's default-termination claim. *See, e.g.*, U.S. Br. 33-34. But the Contractors plainly raised this contention as a defense to the Government's default-termination claim. Under the Federal Acquisition Regulation ("FAR"), the Government's breach of its superior-knowledge duty may – and in this case does – excuse a contractor's alleged default. 48 C.F.R. § 52.249-9(g) (1984) [JA 226]; *see Hardeman-Monier-Hutcherson v. United States*, 458 F.2d 1364, 1369-73 (Ct. Cl. 1972). Accordingly, the Government, the CFC, and the court of appeals all recognized the Contractors' superior-knowledge argument as a *defense* in the proceedings below. *See, e.g.*, Pet. App. 182a (listing superior knowledge among "the Contractors' defenses"); Pet. App. 243a (same); JA 923 (Government's pretrial submission listing "the Navy's alleged withholding of superior knowledge" among the "anticipated affirmative defenses"); JA 1274 (Government's brief to court of appeals defending trial court's handling of "the Defense of Superior Knowledge"). Indeed, even the Government's strained attempts in this Court to characterize the Contractors' superior-knowledge contentions as an affirmative claim for relief only confirm

that they are in fact a defense to its default-termination claim. *See, e.g.*, U.S. Br. at (I) (describing these contentions as "one of petitioners' claims seeking to excuse their default").[1]

It does not matter that the Contractors bear the burden of proving their superior-knowledge contentions because, as relevant here, the Contractors assert them not to obtain affirmative relief but rather to defend against the Government's default-termination claim. Indeed, it is not at all uncommon for a party to bear the burden of proof on a defense to a moving party's claim. For example, criminal defendants bear the burden of proof on a variety of affirmative defenses, yet the Government remains the moving party because it is seeking to impose an affirmative punitive sanction, which the defendant seeks only to avoid. And under *Reynolds* and *Jencks v. United States*, 353 U.S. 657 (1957), the Government surely could not maintain a criminal prosecution while invoking the state secrets privilege to bar litigation of a prima facie valid affirmative defense. To the contrary, as the Government recognizes, the

[1] To be sure, the Contractors also sought an equitable adjustment based on the Government's failure to share its superior knowledge in connection with their separate claim to recover reasonable profits on work completed in the event the default termination was converted to one for convenience But the fact that they made this additional argument does not change the fact that they also raised superior knowledge as an essential defense to the Government's default-termination claim. *See* Boeing Br. 13-15.

party seeking affirmative relief remains the moving party, "even if the [opposing party] bears the burden of proof on some subsidiary questions." U.S. Br. 33.

B. The Government's Assertion That It Sought No Affirmative Relief *from the CFC* Is Irrelevant.

The Government also repeatedly claims that it sought no affirmative relief from the Contractors in the *Court of Federal Claims*. In so arguing, it asks this Court to ignore the facts that it seeks to recover billions of dollars from the Contractors as affirmative relief on its default-termination claim, that it has already issued a unilateral decision awarding itself this relief, and that, pursuant to the unique, Government-designed statutory framework that controls this case, that decision had the force of law and would have been "final and conclusive" had the Contractors not put the Government to its proof on its default-termination claim by timely bringing this suit in the CFC. 41 U.S.C. § 605(b); *see also* § 609(a)(1).

The Government does not – indeed cannot – seriously dispute that it was the moving party or that it sought and obtained affirmative relief on a Government claim *before the Contracting Officer*. Indeed, the Contracting Officer determined that default termination was appropriate and ordered the Contractors to pay the Government $1.35 billion plus interest.

1. Although the Government is thus plainly the moving party on the underlying default-termination claim at issue here, it nevertheless argues that it was not the moving party *in the CFC*. In support of this contention, it repeatedly argues that if it prevails in this lawsuit the result will simply be the same as if no lawsuit had ever been filed and that "any collateral consequences that petitioners' default termination might entail are traceable to the contracting officer's decision." U.S. Br. 37-38. But given the force of law afforded Contracting Officer decisions by the Contract Disputes Act ("CDA"), this argument plainly rings hollow: had this suit never been filed, the Government could have obtained all of the affirmative relief it seeks – $1.35 billion plus interest from the Contractors – simply on the strength of the Contracting Officer's decision, which would have been conclusive in a suit by the Government to enforce the decision and obtain payment from the Contractors directly, or in an action by the Contractors challenging the Government's offset of the payment against money due them under other contracts. *See Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 & n.4 (Fed. Cir. 1990) (unless contractor puts Government to its proof before BCA or CFC, Contracting Officer's decision becomes final and "[t]he government may obtain a judgment on the basis of such decision in a state or federal court without litigating the merits"); *United States v. Suntip Co.*, 82 F.3d 1468, 1474 (9th Cir. 1996) (finding suits to enforce Contracting Officers' decisions "similar to a suit on a judgment, because the merits of the officers' decisions

are not subject to attack"); *United States v. Kasler Elec. Co.*, 123 F.3d 341, 345-46 (6th Cir. 1997) (similar).

2. The Government similarly asserts that it was not the moving party in the CFC because it did nothing more than "simply urge[] dismissal" of the Contractors' suit. U.S. Br. 35. But this action (or substantively identical proceedings before a BCA) provides the Contractors' only access to a neutral tribunal to defend against the affirmative relief the Government sought to award itself. Further, the Government contends that dismissal of the Contractors' action would, without more, entitle it to enforce the Contracting Officer's decision. Accordingly, it would have been unremarkable had the Government merely urged dismissal of the action filed in the CFC, for according to the Government, there was no need for it to do anything else to preserve its ability to collect the award of $1.35 billion plus interest ordered by its Contracting Officer.[2]

In short, the fact that the Contractors put the Government to its proof on its default-termination claim by bringing this action in the CFC, as required by the CDA, no more changes the Government's status as the moving party on this claim than it changes the fact that default termination is a

[2] As Petitioner General Dynamics explains, moreover, *see* General Dynamics Reply 2, 10, the Government did not simply urge dismissal of the Contractors' challenge to the default termination. Rather, it urged the CFC to sustain the default termination.

Government claim on which it bears the burden of proof. Indeed, in light of the unique framework Congress has created for adjudicating Government claims against private contractors, moving-party status simply cannot turn on who brings the CDA action in court. As the Government concedes, *see* U.S. Br. 31, under the CDA and the Tucker Act, the Government cannot initiate proceedings in court for any contract dispute; rather, it must present its claims to the Contracting Officer. Far from disadvantaging the Government, this unique procedural rule was designed by the Government and operates to its clear benefit: the Contracting Officer, who is a Government employee subject (as this case well illustrates, *see* Boeing Br. 5-6) to Government supervision and control, can render a legally enforceable award against the contractor. Accordingly, if moving-party status depends not on who is seeking affirmative relief on the underlying claim, but solely on who initiated the action in the CFC, the Government has structured the game board to ensure that it can *never* be the moving party in contract disputes, and that private contractors will *always* bear the full consequences of the Government's invocation of the state secrets privilege in such disputes.

The Government offers no good reason in support of its "heads we win, tails you lose" approach to moving-party status and the allocation of the consequences of the invocation of the state secrets privilege. In contrast, basic principles of due process and fundamental fairness strongly support the rule

embraced by precedent and urged by the Contractors – that a claim for affirmative relief (whether brought by – or against – the Government or anyone else) may not proceed if invocation of the state secrets privilege substantially prejudices the opposing party's ability to defend.

3. In light of the unique statutory framework governing this case, the Government is plainly not similarly situated to a private party to a contract who withholds performance because it believes its counterparty has failed to perform, as the Government asserts, *see* U.S. Br. 36. Unlike the Government, such a party cannot unilaterally issue a judgment against its counterparty that will have the force of law unless promptly challenged in court.

4. Similarly, although the Government cites various cases for the proposition that "[p]ersons who challenge adverse agency action" are treated as moving parties, *see* U.S. Br. 29, none of those cases addressed a challenge to an administrative decision *having the force of law*, let alone a decision *granting the Government affirmative relief on a Government claim*. And certainly none of those cases addressed a circumstance where the Government bears the burden of proving to the courts, *de novo*, its entitlement to such relief. Indeed, to the extent those cases bear on the issues presented here, they support the rule sought by the Contractors. *See, e.g.*, *Sterling v. Tenet*, 416 F.3d 338, 347-48 (2005) (dismissing claim because, *inter alia*, Government could not "defend against it, without presenting evidence on

topics that are state secrets"); *Kasza v. Browner*, 133 F.3d 1159, 1166 (1998) ("if the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant") (quotation marks omitted); *Edmonds v. United States Dep't of Justice*, 323 F. Supp. 2d 65, 81-82 (D.D.C. 2004) (dismissing claims because, *inter alia*, defendants could not defend without disclosing privileged information).

II. There Is No Basis for the Government's Alternative Rule that the Government – and Only the Government – May Proceed with a Civil Claim when Its Invocation of the State Secrets Privilege Substantially Prejudices the Opposing Party's Ability to Defend.

The Government maintains that even if it is the moving party on its default-termination claim, the foreclosure of the Contractors' superior-knowledge defense as a result of the Government's assertion of its state secrets privilege does not warrant dismissal of its default-termination claim. The Government's argument rests largely on a hyperbolic mischaracterization of the Contractors' position. The Contractors do not contend that the Government's claim should *automatically* be dismissed to penalize the Executive's assertion of the privilege. Rather, they contend that dismissal of an affirmative claim for relief, whether brought by the Government or a private

party, will be necessary only as a last resort when there is no adequate alternative that would protect the state secret without substantially prejudicing the opposing party's ability to defend. Not only is this rule compelled by basic principles of due process and fairness, it is also the same rule repeatedly and successfully invoked by the Government when it furthers the Government's own interest, and there is no principled basis for the Government's proposed, self-serving exemption from that rule when it does not.

A. The Government Mischaracterizes the Rule Sought by the Contractors.

The Government's arguments rest on a pervasive distortion of the Contractors' position. The Contractors do not contend, as the Government would have it, that a court should "automatically enter[] judgment against the government" whenever it "asserts the state-secrets privilege as the 'moving party' in a civil case." U.S. Br. 39; *see also* U.S. Br. 20, 26, 39-41, 49, 51. Rather, they contend that dismissal is warranted if, but only if, the opposing party's ability to defend against an affirmative claim for relief is substantially prejudiced by the Government's assertion of privilege, and there is no adequate alternative remedy to ensure the integrity of the adjudicative process. Significantly, the Contractors' proposed rule would apply neutrally, without regard to whether the

Government is bringing a claim for affirmative relief or defending against a claim brought by a private party.

1. The Contractors were substantially prejudiced when the Government's assertion of privilege foreclosed their superior-knowledge defense to the Government's default-termination claim, potentially entitling the Government to billions of dollars. The Government frets about "marginal or meritless" defenses, U.S. Br. 18, 20, 26, but the trial court determined that the Contractors had "made an impressive showing that they can present a prima facie case" for their defense using only the non-privileged evidence available to them. JA 623; *see also* Boeing Br. 16-19, 22-23. That conclusion was not vitiated by the trial court's later conclusion that it "cannot know whether [the superior-knowledge defense] has merit." Pet. App. 246a; *cf.* U.S. Br. 16 n.8. The court's point was merely that, without the privileged evidence, it could not resolve the *ultimate* merits of the defense. *See* Pet. App. 245a.

Relying on a selective, one-sided recitation of the facts, the Government nonetheless tries to cast doubt on the trial court's undisturbed conclusion that the Contractors' superior-knowledge defense was legally sound and well supported by the available, non-privileged evidence. *See* U.S. Br. 3-7, 52-53; *cf., e.g.*, Pet. App. 354a n.7; JA 389-94. But the Government does not – and cannot – contend that the Contractors' superior-knowledge defense is pretextual. And in all events, as the Government eventually admits, the

merits of the Contractors' superior-knowledge defense are not before this Court and, to the extent the Government has preserved them, its challenges to the sufficiency of the defense may be considered on remand. *See* U.S. Br. 53 & n.19.

2. The Contractors initially did not seek dismissal of the Government's default-termination claim. Rather, the Contractors urged the trial court to allow their defense to proceed without the privileged evidence. Pet. App. 245a; *see also* Pet. App. 355a, 367a; JA 769. The *Government* resisted further litigation concerning superior knowledge because of the risk of inadvertent disclosure of privileged evidence. Pet. App. 205a-06a; Pet. App. 344a n.1, 355a, 374a-76a; JA 1233-35. And before barring the superior-knowledge defense, the trial court doggedly "searched for ways" to litigate it "on the basis of [the Contractors'] *prima facie* evidence" without risking the disclosure of state secrets. Pet. App. 369a; *see, e.g.*, Pet. App. 244a; Pet. App. 355a-59a; JA 768-69. The trial court ultimately determined that the risk of disclosure was unacceptable, and so it precluded the Contractors from asserting their prima facie valid defense. It has thus become clear that there is no adequate alternative remedy to dismissal of the Government's default-termination claim that will ensure the integrity of the adjudicative process.

B. The Contractors Do Not Seek to "Penalize" the Government for Asserting the Privilege.

The Government's repeated claim that the Contractors impermissibly seek to "penalize" it for asserting its state secrets privilege, *see* U.S. Br. 18, 22, 27, 39, 43-46, 50, depends largely upon the Government's mischaracterization of the Contractors' proposed rule. Because the Government's default-termination claim would be dismissed not automatically, but only in light of the substantial prejudice to the Contractors' ability to defend and the lack of any adequate alternative, dismissal here is not a "penalty," but rather a necessary, proper, and neutral remedy to ensure due process and the integrity of the adjudicative proceedings, as a variety of authorities have recognized.

1. The three lower court decisions cited by the Government in which "the government invoked the state-secrets privilege as a civil plaintiff," U.S. Br. 42, actually support the Contractors' position that dismissal of a civil Government claim is warranted under the present circumstances. In *Attorney General v. Irish People, Inc.*, the court explained that, upon assertion of the state secrets privilege, "courts must balance a number of factors in determining how to proceed when one side or the other has claimed that certain evidence is privileged." 684 F.2d 928, 950-51 (D.C. Cir. 1982). The court acknowledged that "dismissal is not automatic," but it also made clear that it was "not asserting that dismissal is never proper in a civil context." *Id.* at 953 & n.144. The court held that

dismissal was inappropriate in that case because there was no showing that "the material which defendant seeks is relevant, let alone necessary, to the defense" and because "[t]here are . . . alternatives available to defendant, which will afford the information which would be useful to it at a civil trial, while not impairing the Government's legitimate interests." *Id.* at 954; *see also United States v. Koreh*, 144 F.R.D. 218, 223 (D.N.J. 1992) (concluding under *Irish People*'s "balancing approach" that Government's complaint should not be dismissed because privileged state secrets would "add[ ] little or nothing to the ammunition defendant [already] ha[d]" and because, as an alternative to dismissal, "Government ha[d] offered to stipulate to the information that the withheld documents would disclose"); *Republic of China v. National Union Fire Ins. Co.*, 142 F. Supp. 551, 557 (D. Md. 1956) (court declined to dismiss Government claim notwithstanding assertion of state secrets privilege because "necessity for the disclosure of the information requested [by the civil defendant was] dubious").

2. Proposed Federal Rule of Evidence 509(e) instructed that, if the Government's assertion of its state secrets privilege "deprived [the opposing party] of material evidence," the court should remedy the deprivation by "mak[ing] any further orders which the interests of justice require," including "dismissing the action." 56 F.R.D. 183, 252 (1972); *see* Boeing Br. 48-49.

Citing an Advisory Committee note, the Government suggests that the Contractors seek to use the assertion of the privilege "as an offensive weapon against" the Government. 56 F.R.D. at 254, *quoted in* U.S. Br. 46 n.15. To the contrary, the Contractors merely seek defensively to ensure the integrity of the proceedings under substantively and procedurally limited conditions: if the Government's assertion of privilege requires the Contractors to lay down their shield, the Government must lay down its sword.

3. Contrary to the Government's assertion, U.S. Br. 43-44, cases involving the privilege against self-incrimination have reached similar conclusions. *See* Boeing Br. 49-51. For example, although the court in *Serafino v. Hasbro, Inc.* rejected "automatic dismissal" as a constitutionally impermissible "penalty" upon a civil plaintiff's invocation of the self-incrimination privilege, it nevertheless approved of dismissal "as a *remedy* to prevent unfairness to the defendant" where "defendants would be substantially prejudiced" by the privilege and there was "no adequate alternative remedy to dismissal." 82 F.3d 515, 517-19 (1st Cir. 1996) (quotation marks omitted); *see also Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1087-88 & n.6 (5th Cir. 1979) (same).

Campbell v. Gerrans, cited by the Government, held only that the assertion of the self-incrimination "privilege in the discovery stage of a civil case cannot *automatically* be characterized as 'willful default' resulting in dismissal." 592 F.2d 1054, 1057-58 (9th Cir. 1979) (emphasis added), *cited in* U.S. Br. 44.

United States v. Certain Real Property and Premises Known as 4003-4005 5th Ave., 55 F.3d 78 (2d Cir. 1995), did not concern whether "a party's invocation of that privilege [can] justify dismissal of his claim," U.S. Br. 44, but rather whether a party's *withdrawal* of the privilege claim justified barring his testimony. In any event, the court prescribed consideration of "the precise facts and circumstances" to craft an "appropriate remedy for the assertion of the privilege." 55 F.3d at 84-85 (quotation marks omitted). And *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.* held only that "[r]elevance is not the standard" for determining whether the attorney-client privilege should be deemed waived. 32 F.3d 851, 864 (3d Cir. 1994), *cited in* U.S. Br. 43.

C. The Contractors Seek Only the Same Treatment the Government Demands for Itself.

The Government's brief in this Court is conspicuously silent as to its position on cases in which the assertion of the state secrets privilege substantially prejudices *the Government's own defense* against a civil claim. In fact, the Government has repeatedly and successfully argued that a private civil claim cannot proceed against it (or its affiliates) in such circumstances. *See* Boeing Br. 52-54. The Contractors ask only for the same rule that the Government insists upon when similarly situated. There is no

principled basis for the self-serving exemption from this rule urged by the Government here.[3]

1. Most fundamentally, the threat posed to the integrity of the judicial process when the assertion of the state secrets privilege substantially prejudices a party's ability to defend is certainly not less when the prejudiced party is a private actor rather than the Government. If anything, the threat is greater, and thus the need for procedural "protection is of particular importance," when the Government is the party both asserting the privilege and advancing a claim for affirmative relief, and thus "has a direct pecuniary interest in the outcome of the proceeding." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55-56 (1993).

2. The Government's sovereign immunity argument, *see* U.S. Br. 28, 35-36, fails because the Government is the moving party seeking affirmative relief on its default-termination claim. *See* Boeing Br. 41-42.

[3] The one-sided nature of the Government's position in civil cases is not mitigated by its concession that dismissal is appropriate when the state secrets privilege substantially prejudices a criminal defendant's ability to defend. *See* U.S. Br. 39-41. Indeed, permitting a criminal to go free will often pose a graver harm to the public than merely forgoing a civil claim. In all events, it is well settled that the principles of basic fairness and due process upon which the Contractors rely apply to civil as well as criminal defendants. *See* Boeing Br. 29-30, 35-38, 40-43; General Dynamics Reply 18-19.

3. None of the authorities cited by the Government establishes that the Contractors' proposed rule would impair the Government's ability to carry out immigration, counterterrorism, or intelligence programs. *See* U.S. Br. 41 n.13, 42. The programs referenced by the Government all permitted consideration of classified information ex parte and in camera. *See* 8 U.S.C. § 1189(a)(3)(B), (c)(2); *id.* § 1225(c)(2); *id.* § 1229a(b)(4), (c)(2); *id.* § 1534(e)(3); 18 U.S.C. § 2339B(f); *id.* § 3511(e); 50 U.S.C. § 1702(c); *id.* § 1806(f); 8 C.F.R. § 244.3 (1952). Because the Contractors were entirely foreclosed from litigating a prima facie valid defense and there is no adequate alternative remedy to dismissal, the Court need not decide whether due process allows the Government to press a claim while confining classified evidence to ex parte, in camera consideration. In any event, these programs would not be impaired by adoption of the rule proposed by the Contractors because they explicitly require that the classified information be disclosed to the private party if necessary to adjudicate the defense, 18 U.S.C. § 2339B(f)(2)(B); 50 U.S.C. § 1806(f), or involve persons having little or no due process rights, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212-14 (1953); *Jay v. Boyd*, 351 U.S. 345, 358-59 (1956), or would plainly be undermined by the disclosure of classified evidence, *see, e.g.*, 8 U.S.C. § 1189 (designation of foreign terrorist organizations); *id.* § 1534 (alien terrorist removal); 18 U.S.C. § 2339B (prohibition of material support of foreign terrorist organizations); 50 U.S.C. §§ 1701-02 (emergency freeze of foreign assets); *id.* § 1806

(warrantless foreign intelligence surveillance); *see Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002).

4. The Government fears, it says, that a ruling for the Contractors here would encourage contractors to "raise marginal or meritless superior-knowledge or other claims simply to induce the government to invoke the state-secrets privilege, thereby achieving automatic invalidation of a justified default termination." U.S. Br. 20. But under the Contractors' proposed rule, dismissal would be subject to the substantive and procedural limitations discussed above. Notably, the Government has not suggested, nor could it suggest, that the Contractors disingenuously asserted their superior-knowledge defense.

5. Finally, the Government's hypothesized "conflict" between its "duty . . . to safeguard national security" and its "responsibility to protect the public fisc," U.S. Br. 18, 26, 45-46, will rarely occur. As the many cases discussed in the briefs show, the rule advocated by the Contractors will almost always be invoked by *the Government as defendant* (or for the benefit of an affiliated defendant). In those cases, there is no conflict between the interests in securing the Nation's secrets and preserving the public fisc. In the few cases where the invocation of the state secrets privilege substantially prejudices a private party's ability to defend against a Government claim, it is entirely appropriate for the Government to bear the burden of protecting the Nation's secrets by forgoing its claim. In its brief to this Court in *Reynolds*, the

Government explained this point well: when it is the "plaintiff," the Government may fairly be put to the "choice of seeking the aid of the courts by pursuing the action," on the one hand, "or of refusing to produce" state secrets, on the other hand, for even if the Government "refuses to produce" and thus is "denied judicial assistance," "the public is left in no worse position than if [the Government] had never instituted the action." Br. for United States at 17, 66, 345 U.S. 1 (1953), *available at* 1952 WL 82378; *see* Boeing Br. 35-36.

♦

CONCLUSION

The judgment of the court of appeals should be reversed.

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